LIBRARY
SUPREME COURT, U. S.

No. 380

Office-Supreme Court, U.S.
FILED
OCT 5 1961
JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

ELOF HANSSON, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
STANLEY M. KOLBER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492	8
Hotch v. *United States*, 212 F. 2d 280	8
Kleberg & Co. v. *United States*, 21 CCPA (Customs) 110, 71 F. 2d 332	10
Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411	8
United States v. *Central Vermont Ry. Co.*, 17 CCPA (Customs) 166, 71 F. 2d 332	9-10
United States v. *Tucker Truck Lines*, 344 U.S. 33	6, 7, 8

Statutes:

Act of August 14, 1958, 72 Stat. 583	10
Act of September 1, 1954, c. 1213, Title III, § 301, 68 Stat. 1138	9
Administrative Procedure Act of June 11, 1946, ch. 324, 60 Stat. 237, 5 U.S.C. 1001-1011:	
Section 2	13
Section 2(a)	13
Section 2(c)	9, 13
Section 2(d)	9, 13
Section 2(g)	14
Section 3	14
Section 3(a)	14
Section 3(b)	15
Section 4	5, 15

Statutes—Continued

	Page
Section 4(a)	15
Section 4(b)	16
Section 4(d)	16
Section 5	9, 16
Section 10	10, 16
Section 10(e)	8, 16
Section 11	6
Antidumping Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160, *et seq.* (1952 ed.)	2, 17
Section 201(a)	5, 9, 10, 17
Section 201(b)	17
Section 202(a)	4, 18
Section 203	9
Section 205	9
Miscellaneous:	
1 Davis, *Administrative Law Treatise* 287-288 (1958 ed.)	9
4 Davis, *Administrative Law Treatise* 33, 80 (1958 ed.)	10
Ehrenhaft, "Protection Against International Price Discrimination"	11
Hearings, Amendments to the Antidumping Act of 1921, House Ways and Means Committee, 85th Cong., 1st Sess.	10, 11
Hearings on Antidumping, Senate Committee on Finance, 85th Cong., 2d Sess. 269, 287	11
Note, *United States Countervailing and Antidumping* Duties, 58 Col. L. Rev. 44 (1958)	11

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 380

ELOF HANSSON, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the single judge of the United States Customs Court (Tr. 76-94) [1] is reported at 41 Cust. Ct. 519. The opinion of the Third Division of the Customs Court (Tr. 98-112) is reported at 178 F. Supp. 922. The opinion of the United States Court of Customs and Patent Appeals (Pet. App. B, 3-8) is reported at 96 Treasury Decisions (No. 24, June 15, 1961) 71.

---

[1] "Tr." refers to the Transcript of the Record before the Court of Customs and Patent Appeals. "R" refers to the Record before this Court.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 22, 1960 (R. 3). A timely petition for rehearing was denied on June 5, 1961 (R. 14). The petition for a writ of certiorari was filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.[2]

QUESTIONS PRESENTED

1. Whether, petitioner, in the circumstances of the case, may challenge an administrative determination under the Antidumping Act on a ground which petitioner did not raise in the proceedings culminating in that determination.

2. Whether notice of an investigation conducted by the Secretary of the Treasury under the Antidumping Act must be published in the Federal Register.

STATUTES INVOLVED

The relevant provisions of the Antidumping Act of 1921, 42 Stat. 11, 19 U.S.C. 160, *et seq.* (1952 ed.) and of the Administrative Procedure Act are set forth in the Appendix, *infra,* pp. 13-18.

STATEMENT

In March 1953, pursuant to a complaint by the American Hardboard Association (Tr. 51), the Secretary of the Treasury began an investigation under Section 201 (a) of the Antidumping Act of 1921 (App., *infra,* p. 17) to determine whether importations of Swedish hardboard were being, or were likely to be, sold in the United States at less than fair value, to

[2] The petition inadvertently refers to 28 U.S.C. 1254(1).

the injury of the American hardboard industry. Petitioner, an importer of Swedish hardboard, was apprised of this investigation in a discussion with an Examiner of Merchandise in the office of the United States Appraiser of Merchandise at New York City prior to May 5, 1953 (Tr. 12). At that time petitioner was requested to furnish certain data from its Swedish suppliers, and under a covering letter dated May 5, 1953, petitioner submitted this data (Tr. 12).

As the investigation progressed, the Treasury amassed a voluminous file consisting of information supplied by importers, the domestic industry, and Swedish manufacturers (Tr. 27-28, 56-57, 12). Conferences were held with representatives of importers, the domestic industry, and the Swedish Embassy (Tr. 27, 50). Counsel for petitioner, in particular, conferred several times with Treasury officials and supplied information (Tr. 44, 50, 99, 111). Petitioner was kept advised of the investigation and was told that Treasury "would welcome any information pertinent to the investigation" (Tr. 44, 52). Accordingly, on August 10, 1953, counsel for petitioner submitted a four page letter, with thirteen pages of attachments, in support of its contention that sales at less than fair value were not taking place (*i.e.*, that there was no dumping of Swedish hardboard) (Deft's. Ex. B-6). Four more letters containing relevant data were so submitted (Deft's Exs. B-7, B-8, B-9, B11).

In October 1953, pending completion of the investigation, the Acting Commissioner of Customs directed appraisement to be withheld on all unappraised Swedish hardboard (Tr. 11-12, 111). From that date for-

ward, in accordance with standard Treasury Department procedure, every importer of Swedish hardboard was mailed customs Form No. 6459, "Notice of Withheld Appraisement," advising that an investigation of dumping was in progress (Tr. 12, 45-48, 79, 111). No less than 106 such notices were sent to petitioner (Deft's. Ex. D-1, D-2).

Petitioner continued to supply information in support of the importers' position. On October 28, 1953, it responded to questions of the Appraiser in Philadelphia (Deft's. Ex. B-10). In December 1953, and March, May, and June 1954, petitioner supplied information and submitted arguments on the issue of injury to the domestic industry (Deft's. Exs. B-12, B-13, B-14, B-15).

The importation here involved was entered at the port of New York in December 1953 (Tr. 11). Notice of Withheld Appraisement was sent to petitioner in February 1954. On August 26, 1954, the Acting Secretary of the Treasury made a finding of dumping, which was published in the Federal Register (Tr. 10-11). Subsequently, the Appraiser at the port of New York appraised the merchandise in question and correctly determined its purchase price to be less than its foreign market value within the meaning of Section 202(a) (Tr. 11). Accordingly, he assessed the special dumping duty prescribed by Section 202(a), 19 U.S.C. 161(a). Notice of appraisement was thereupon mailed to petitioner (Tr. 12).

Petitioner then brought this appeal for reappraisement in the Customs Court (Tr. 6). There, for the first time, it raised the question of whether the notice

of the investigation of dumping was sufficient, arguing that the failure to publish notice of the investigation in the Federal Register invalidated the Secretary's finding of dumping. A single judge of the court rejected this contention, holding that such publication was not required since the Administrative Procedure Act, which provides for such notice, did not apply to investigations under Section 201(a) of the Antidumping Act (Tr. 76-93). The Appellate Term of the Third Division of the Customs Court reversed. It held that the Administrative Procedure Act was applicable to dumping investigations and that the failure to publish notice as required by Section 4 of that Act rendered the finding of dumping invalid (Tr. 98-113).

The Appellate Term judgment was, in turn, reversed by the Court of Customs and Patent Appeals (Tr. 1). That court held, without deciding the applicability of the Administrative Procedure Act, that petitioner had waived the alleged irregularity by failing to raise it during the administrative proceedings.

ARGUMENT

In this action, petitioner endeavors to invalidate the dumping finding of the Secretary of the Treasury on the sole ground that notice of the investigation culminating in that finding was not published in the Federal Register. The record shows, however, that petitioner not only had actual notice of the investigation, but also—along with other importers of Swedish hardboard—participated fully. Moreover, at no time during the administrative proceedings did petitioner raise the purported procedural irregularity.

Rather, it waited until the investigation had been completed and then raised the point for the first time on its challenge in the Customs Court to the imposition of the special dumping duty.

In these circumstances, the Court of Customs and Patent Appeals was clearly correct in its conclusion that, under the established principles confirmed by this Court in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, petitioner's assertion regarding Federal Register notice came too late. Additionally, although the court below did not reach the question, there is no necessity to give such notice of investigation under the Antidumping Act. Further review by this Court is, therefore, not warranted.

1. In *United States* v. *Tucker Truck Lines, supra*, a motor carrier applied to the Interstate Commerce Commission for a certificate of convenience and necessity. Tucker intervened in the Commission proceedings to oppose the application. The Commission granted the certificate, whereupon Tucker sought judicial review. In the district court, Tucker contended for the first time that the Commission examiner who conducted the hearing on the application had not been appointed in accordance with Section 11 of the Administrative Procedure Act. The three judge district court accepted this contention and invalidated the certification. 100 F. Supp. 432.

This Court reversed. It agreed that there was a "defect in the examiner's appointment * * * which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings" 344 U.S. at 38. Since, however, an ob-

jection had not been made at that time, Tucker was precluded from challenging the certification on that ground in the district court. As the Court pointed out (344 U.S. at 36-37):

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

This rationale plainly applies to the present case. Here, as in *Tucker*, the issue sought to be raised initially on judicial review "is clearly an afterthought, brought forward at the last possible moment to undo the ad-

ministrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." 344 U.S. at 36. "Orderly procedure and good administration" as well as "simple fairness" to the Secretary and to the interested parties required petitioner to object to the lack of Federal Register notice during the course of administrative proceedings in which it fully participated. Obviously petitioner had ample notice. The only possible injury to petitioner, therefore, lies in the chance that some other person would have responded and introduced evidence or argument not presented by petitioner. The chance seems theoretical at best, but petitioner could have secured it by timely objection to the lack of publication in the Federal Register. Had it done so, the Secretary would have had an "opportunity for correction". By not doing so, petitioner waived the objection.[3]

Petitioner's reliance (Pet. 5) upon *Hotch* v. *United States*, 212 F. 2d 280 (C.A. 9), is misplaced. Apart from the fact that a criminal sanction was there involved, the agency rule under attack had been issued without any hearing being afforded interested parties. Thus, unlike the situation in *Tucker* and this case, the objection could not have been raised on the administrative level.[4]

---

[3] See, also, *e.g.*, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Moog Industries Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414.

[4] In the event that certiorari is granted, the government may also urge that petitioner's assertion is precluded by Section 10(e) of the Administrative Procedure Act since the failure to provide Federal Register notice was not shown to be prejudicial.

2. In any event, in 1953 there was no requirement of Federal Register notice of the commencement of an investigation under the Antidumping Act. At that time the Act concededly contained no provision for such notice and the notice provisions of the Administrative Procedure Act do not apply to dumping investigations.

a. Under the Administrative Procedure Act, all agency action is classifiable either as "rules" or "orders". Section 2(c), 2(d), App., *infra*, p. 13. The Act does not apply to the agency process for the formulation of orders unless some statute requires determination on the record after opportunity for an agency hearing. Section 5, App., *infra*, p. 16. No statute requires a finding of dumping to be made in this manner.

As Professor Davis has pointed out, rule making resembles the enactment of a statute. 1 Davis; *Administrative Law Treatise* 287-288 (1958 ed.). In 1953 the Secretary's function under Section 201(a)[5] was to determine whether American industry was being injured by dumping. A determination of dumping requires findings of "purchase price" and "foreign market value" as defined in Sections 203 and 205 of the Antidumping Act, 19 U.S.C. 162, 164. Therefore, there is absent the policy-making function which the legislative process comprehends. "[T]he powers granted by section 201(a) * * * are ministerial only, call for the exercise of no discretion except in methods, and are fact finding only." *United States* v. *Central Vermont*

---

[5] In 1954 the Antidumping Act was amended to provide that the determination of injury to domestic industry would be made by the Tariff Commission after the Secretary found dumping. Act of September 1, 1954, c. 1213, Title III, Section 301, 68 Stat. 1138

Ry. Co., 17 CCPA (Customs) 166, 172, 173; *Kleberg & Co.* v. *United States*, 71 F. 2d 332, 335.

Further, to the extent that the Antidumping Act provides that the Secretary shall make a finding of dumping "after such investigation as he deems necessary", the manner of proceeding under Section 201(a) is left to agency discretion and as such is beyond the reach of the Administrative Procedure Act. See Section 10 of that Act; 4 Davis, *Administrative Law Treatise* 33, 80 (1958 ed.). Cf. *United States* v. *Central Vermont Ry. Co.*, *supra*, at 172, 173, 174; *Kleberg & Co.* v. *United States*, 21 CCPA (Customs) 110, 115, 71 F. 2d 332, 334.

b. The conclusion that the Administrative Procedure Act does not apply to dumping investigations is buttressed by common understanding. In 1958 the Antidumping Act was amended to provide specifically for publication of notice of a dumping investigation. Act of August 14, 1958, 72 Stat. 583. The House Committee on Ways and Means added this provision after an Assistant Secretary of the Treasury, the American Bar Association, and the spokesman for the Association of the Customs Bar all categorically asserted in hearings before the committee that existing law failed to require such notice. Hearings, Amendments to the Antidumping Act of 1921, House Ways and Means Committee, 85th Cong., 1st Sess. 77, 100, 101, 223, 224. Numerous other witnesses and organizations urged upon the Committee the need for this procedural reform without hint of a suggestion that the Administrative Procedure Act might already be applicable. *Id.* at 123, 131, 132, 199, 200, 210, 218, 220, 370-71, 374.

378, 398, 400, 402, 403, 405, 421, 425.[6] The entire context of this legislation points to the conclusion that the Congress, the Treasury Department, the Bar, the commentators and interested importers were of the view that the Procedure Act was inapplicable to this type of investigation. For it is most unlikely that that Act could have been overlooked as the controlling law.

3. Finally, the enactment of the 1958 Amendment to the Antidumping Act of 1921 makes review of the decision below inappropriate for two additional reasons. First, the underlying legal question giving rise to the present case has been resolved by the statutory requirement that notice of dumping investigations be filed in the Federal Register. Second, there is no reason for the Court to undertake at this time a premature and wholly abstract consideration of the circumstances in which a party may be precluded from challenging an agency decision on grounds of violation of the Administrative Procedure Act; for the specific issue of the right to reversal of an administrative finding of

---

[6] "A further well-publicized flaw in this portion of the act is its lack of provision for public notice that a dumping investigation has been authorized or that one has been concluded. The Antidumping Act amendments passed by the House in 1957 (H.R. 6006) would remedy this situation by requiring announcement in the Federal Register both that an investigation is contemplated and that a decision has been reached, including the reasons therefor. This should go a long way toward correcting a much criticized omission. [I]nterested parties, now [are] to be officially notified of the pendency of an investigation * * *" Hearings on Antidumping, Senate Committee on Finance, 85th Cong., 2d Sess., 269, 287, quoting from Ehrenhaft, "Protection Against International Price Discrimination": Note, *United States Countervailing and Antidumping Duties*, 58 Col. L. Rev. 44, 61 (1958).

dumping for failure of published notice will henceforth be controlled by the 1958 Amendment to the 1921 Antidumping Act and not by the Administrative Procedure Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
STANLEY M. KOLBER,
Attorneys.

OCTOBER, 1961.

APPENDIX

The Administrative Procedure Act of June 11, 1946, ch. 324, 60 Stat. 237, 5 U.S.C. 1001-1011, provides in pertinent part as follows:

DEFINITIONS

SEC. 2. As used in this Act—

(a) Agency.—"Agency" [illegible] subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

* * * * *

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval of prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and Adjudication. "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other

than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * *

(g) Agency Proceeding and Action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed

to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and Orders.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

* * * * *

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contract—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates

the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

* * * * *

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *

* * * * *

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

(e) Scope of Review.—* * * In making the foregoing determinations the court shall review the

whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

The Antidumping Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160-171 (1952 ed.), provided in pertinent part as follows:

DUMPING INVESTIGATION

SEC. 201. (a) That whenever the Secretary of the Treasury (hereinafter in this Act called the "Secretary"), after such investigation as he deems necessary, finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of any class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the appraiser or person acting as appraiser has reason to believe or suspect, from the invoice or other papers or from information presented to him, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the cost of production) he shall forth-

with, under regulations prescribed by the Secretary, notify the Secretary of such fact and withhold his appraisement report to the collector as to such merchandise until the further order of the Secretary, or until the Secretary has made public a finding as provided in subdivision (a) in regard to such merchandise.

SPECIAL DUMPING DUTY

SEC. 202. (a) That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

GOVERNMENT PRINTING OFFICE 1961